IN THE

# Supreme Court of the United States

October Term, 1955
No. 323

UNITED STATES OF AMERICA ex rel. DAVID DARCY,

*Petitioner*

v.

EARL D. HANDY, Warden of Bucks County Prison, DR. FRED S. BALDI, Warden of the Western State Penitentiary, and CARL H. FLECKENSTINE, United States Marshal for the Middle District of Pennsylvania,

*Respondents*

## BRIEF FOR RESPONDENTS

*On Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

DONALD W. VAN ARTSDALEN,
*District Attorney*
Doylestown, Pa.
FRANK P. LAWLEY, JR.
*Deputy Attorney General*
HERBERT B. COHEN
*Attorney General*
Attorneys for Respondents
State Capitol,
Harrisburg, Pa.

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

## INDEX TO BRIEF

## CASES, STATUTES AND AUTHORITIES CITED

Cases:

STATUTES:



AUTHORITIES:

1.

## OPINIONS BELOW

In addition to the opinions below set forth by petitioner, other opinions and orders relating to the instant case are reported as follows:

1. The opinion of the Supreme Court of Pennsylvania, affirming the judgment and sentence imposed upon petitioner is reported at 362 Pa. 259, 66 A. 2d 663 (1949); cert. den., 338 U.S. 862 (October 24, 1949).

2. The order of the Supreme Court of Pennsylvania, denying a petition for writ of habeas corpus to petitioner at No. 9 Miscellaneous Docket 268 is not reported; cert. den., 338 U.S. 862 (October 24, 1949).

3. The opinion of the Supreme Court of Pennsylvania, denying a petition for writ of habeas corpus to petitioner at No. 9 Miscellaneous Docket 431 is reported at 367 Pa. 130, 79 A. 2d 585 (April 9, 1951); cert. den., 342 U.S. 837 (October 8, 1951).

## 2.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

*Constitution of Pennsylvania*

Article I, Section 9.

> "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, *a speedy public trial by an impartial jury of the vicinage;* he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land." (Emphasis supplied)

*Pennsylvania Statute*

The act of June 24, 1939, P. L. 872, Section 701, 18 Purdon's Penna. Statutes Annotated, Section 4701.

> "All murder * * * which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree * * * The jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty

thereof, ascertain in their verdict whether the person is guilty of murder of the first or second degree. . . .

"Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict. . . ."

3.

## QUESTIONS PRESENTED FOR REVIEW

1. In a trial by jury, where a defendant is represented by experienced counsel of his own choosing and no motion is made either for a change of venue or a continuance and evidence that such defendant participated in a robbery and murder is uncontradicted, is such defendant denied due process of law by reason of certain newspaper stories, reporting the murder, and isolated oral comments not oriented as to time, place or person condemning his deed, where the jurors upon extensive voir dire examination state under oath that they will render a verdict under the evidence, and where there is no evidence of any influence having been exerted on such jurors and where the evidence is uncontradicted that the trial was conducted in a calm judicial atmosphere unmarred by any public demonstrations or other manifestation of hysteria and prejudice?

2. In a murder case where the trial record discloses that one judge assists the presiding judge out of the hearing of the jury on one ruling of evidence which ruling is not prejudicial to the defendant and where neither the ruling nor the participation of said judge is questioned on direct appeal, is a defendant denied due process because a newspaper reports that said judge who presided at the trial of the defendant's co-conspirators, commended the jury for its verdict under the evidence and where the said judge appeared

on the bench during the defendant's trial for short periods to transact other business prior to the daily beginning of defendant's trial and on other occasion attended the defendant's trial in street clothes as a spectator, but where there is no evidence that the jury trying defendant was in any way influenced by his presence or alleged commendation?

## 4.

# STATEMENT OF THE CASE

## I.

## HISTORY OF THE CASE

### (a) *Facts Concerning the Crime.*

The facts concerning the crime for which petitioner was tried, found guilty and sentenced to death are best set forth in the opinion of the District Court (R. 1201a-1203a) as follows:[1]

> "About 11:25 P. M., December 22, 1947, David Darcy, 22, Harold Foster, 23, Harry Zeitz, 18, and Felix Capone, 16, arrived at the Feasterville Tavern located at the junction of Churchville-Newtown-Bustleton Roads, in the Village of Feasterville, Lower Southampton Township, Bucks County, Pennsylvania. Darcy, Foster and Zeitz, each armed with a revolver, entered the tavern while Capone acted as a 'lookout' in an automobile parked nearby with the engine running for a quick getaway. During the course of the

[1] The facts of the crime as found by the District Court amplify, but in no way differ from the facts as stated in the opinion of the Supreme Court of Pennsylvania on direct appeal (*Commonwealth v. Darcy*, 362 Pa. 259, 261-263, 66 A. 2d 663, 1949). Footnotes to the District Court's opinion have been omitted.

robbery Darcy fired two shots and then engaged in a scuffle with Allen Hellerman and Edward Wunsch. During the scuffle, Darcy, Zeitz and Foster fired shots. Hellerman fell to the floor, shot in the base of the neck and paralyzed in both lower extremities. Two shots struck Wunsch causing arm and shoulder injuries. After taking the money from the cash register, Foster demanded that everyone produce their wallets. Darcy said he felt 'like shooting someone', and again, 'Where is the police? I feel like shooting some of them.' N. T. T. 304. Darcy then threatened several patrons with his gun, lined them up against the wall with their hands up and demanded their watches. While Foster was 'covering' those present, Darcy and Zeitz reloaded their guns. After robbing the proprietor and some 18 patrons, with Hellerman lying on the floor 'apparently dead' they fired shots into the mouthpieces of the telephone, warned those present not to move for a long time, and departed, Foster returning momentarily as a warning and to wish them all a 'Merry Christmas.'

"Meanwhile, a Mrs. Leutwyler got out a rear door, ran across the road to the Buck Hotel and gave the alarm. At the hotel she found the bartender and two other persons, William Kelly and Frank J. Walter. They followed her outside and stood at the road intersection. While there Horace Patterson, a friend of Kelly, drove out of Churchville Road and stopped to talk with him and Walter. They noticed the automobile, with the engine running, standing in front of the

Feasterville Tavern headed toward Newtown. Darey, Foster and Zeitz ran from the tavern, got into the car and started off with Zeitz at the wheel. Just then, one of Zeitz' companions said: 'Someone is coming out the door.' Zeitz fired two shots, from a gun held in his left hand, from the front window of the driver's side in the direction of Kelly who was then some ten or twenty feet away. One of the bullets struck Kelly in the back of the head causing his death within two days.

"A half hour after Zeitz fired the shots, Darey and his three companions committed another armed robbery of the proprietor and three or four patrons of the Deacon Inn near Penndel, eight miles away from the Feasterville Tavern. Darey said, 'Stop the fooling around. This is a stickup. We just killed a couple of guys.' N. T.-T. 685. Capone, with gun in hand, said, 'You guys ought to try this sometime, it's fun.' N. T.-T. 688. Three shots were fired, two of them into the telephone booth; no one was injured. Upon their return to Philadelphia at 1:17 A.M. December 23, 1947, they were apprehended by Philadelphia police."

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(b) *History of Direct and Collateral Proceedings.*

Following the denial of a motion for a new trial by the Court of Oyer and Terminer of Bucks County, Pennsylvania, an appeal was taken by petitioner to the Supreme Court of Pennsylvania at No. 136 January Term, 1949. The judgment and sentence were affirmed, opinion reported *sub nom Commonwealth v.*

*Darcy*, 362 Pa. 259, 66 A. 2d 663 (May 26, 1949), cert. den., 338 U.S. 862 (October 24, 1949). Prior to the refusal of this Court to review the judgment of the Supreme Court of Pennsylvania at No. 136 January Term, 1949, petitioner, on August 1, 1949, filed a petition for writ of habeas corpus in the Supreme Court of Pennsylvania at No. 9 Miscellaneous Docket 268 which was refused, without opinion, cert. den., 338 U.S. 862 (October 24, 1949), (R. 1195a).

A petition for reargument of the direct appeal in the Supreme Court of Pennsylvania at No. 136 January Term, 1949, was presented to that Court on April 2, 1951; at No. 9 Miscellaneous Docket 429 and refused, without opinion, the following day—April 3, 1951 (R. 1196a). Petitioner did not seek certiorari from this Court. Instead, on the same day, April 3, 1951, a petition for writ of habeas corpus was presented to the United States District Court for the Middle District of Pennsylvania (R. 5a-15a). A rule to show cause issued returnable April 5, 1951, and a stay of execution of the sentence ordered pending determination of the rule (R. 1a). After preliminary oral argument, the application was continued to April 10, 1951, to enable petitioner to present a petition for a writ of habeas corpus to the Supreme Court of Pennsylvania (R. 1a, 1196a). Such a petition was filed in that Court at No. 9 Miscellaneous Docket 431 challenging the constitutional validity of the judgment and sentence *on the same grounds as alleged in the petition in the District Court*. This petition was refused, opinion reported *sub nom Commonwealth ex rel. Darcy v. Claudy*, 367 Pa. 139, 79 A. 2d 585 (April 10, 1951), cert. den., 342 U.S. 837 (October 8, 1951).

On April 11, 1951, the District Court dismissed the petition, opinion reported at 97 F. Supp. 932. On appeal, the Court of Appeals for the Third Circuit remanded the case for hearing on certain allegations contained in the petition (*United States ex rel. Darcy v. Handy*, 203 F. 2d 407).[2]

Upon remand, the District Court, on February 12, 1955, denied the petition for writ of habeas corpus, opinion reported at 130 F. Supp. 270 (R. 1191a-1244a). The Court of Appeals affirmed the judgment of the District Court, opinion reported at 224 F. 2d 504 (R. 1245a-1266a).

This Court, on October 24, 1955, granted certiorari (R. 1269a).

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## II.

## STATEMENT OF FACTS

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### (a) *Summary of Petitioner's Allegations.*

The allegations of the petition for writ of habeas corpus are:

(1) Petitioner was *forced* to go to trial the week following the trial of his co-conspirators, Foster and Zeitz who each were found guilty of murder of the first degree by a jury which fixed the penalty at death for both (R. 9a).

(2) Upon receiving the verdict in the Foster-Zeitz case, the trial judge, Calvin S. Boyer, commended the

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[2] After denial of rehearing by the Court of Appeals this Court denied certiorari on October 26, 1953 (346 U.S. 865).

jury upon its verdict and the commendation was carried in a local newspaper, viz., "The Doylestown Daily Intelligencer" (R. 8a).

(3) Hysteria and prejudice swept the county as the *result* of the Foster-Zeitz trial and verdict and was so general "as to influence [petitioner] to a slight degree" the jury *panel* from which the Darcy jury was selected (R. 8a).

(4) The Darcy jurors were familiar with (a) what had transpired at the Foster-Zeitz trial, (b) petitioner's connection therewith, (c) Judge Boyer's utterances and (d) public and news-paper comments thereon (R. 9a).

(5) During the petitioner's trial, Judge Boyer appeared in the court room, in view of the jurors, and "at times" assisted and conferred with Judge Keller in the conduct of the trial and his presence reminded the Darcy jurors of the Foster-Zeitz trial and the Judge's comments on the verdict thereof (R. 9a).

(6) On June 12, 1948, during petitioner's trial, Judge Boyer in sentencing another criminal condemned the practice of Philadelphia "thieves" coming into Bucks County, that his statement was carried in the press and his "statement and actions *would be definitely reflected* in the jury box and would be prejudicial to their relations in having a fair and impartial trial" (R. 9a-10a).

(b) *Analysis of Petitioner's Allegations.*

(1) *Introduction:* The hearing before the District Court lasted 8 days. Petitioner called 22 wit-

nesses and offered 137 exhibits. The Commonwealth called 11 witnesses and offered 6 exhibits. In addition, the District Court had before it the record of prior proceedings in the State and Federal Courts (R. 100a, 107a). The hearing was conducted jointly by Chief Judge Albert L. Watson and Judge John W. Murphy. The facts relative to petitioner's allegations as found by the District Court and as supported by the State and Federal records are as follows:

> (2) *Allegation.* Petitioner was *forced* to go to trial the week following the trial of his co-conspirators (R. 9a).

The robbery and murder for which petitioner was tried occurred on December 22, 1947 (R. 1201a).

Preliminary hearing before a justice of the peace took place on January 5, 1948. At this hearing, petitioner was represented by counsel *of his own choosing*. Following the coroner's inquest (January 27, 1948) and the filing of the transcript from the justice of the peace (January 29, 1948) (R. 1205a), an indictment was secured on February 19, 1948. On the same day, the *district attorney* moved for a continuance of the trial of the case until the May Term giving as his reasons the critical condition of one of the Commonwealth's witnesses, who had been shot during the robbery, and the fact that one of Darcy's co-conspirators was not represented by counsel (R. 1206a).

On March 1, 1948, the petitioner, through counsel, moved for a severance[3] (R. 1206a).

[3] See the Act of March 31, 1860, P. L. 427, Section 40, 19 Purdon's Pennsylvania Statutes Annotated, Section 785 (Petitioner's Brief, p. 4); (R. 1206a).

On March 3, 1948, the Trial Court appointed counsel for Darey's co-conspirator Foster. In the District Court, the former District Attorney Edward Beister testified that at a conference early in March, defense counsel for Darey was informed that Darey's trial would commence immediately following the conclusion of the trial of his co-conspirator (R. 885a). The District Court found as a fact that such conference took place; and the defense counsel were so informed (R. 1207a). The trial of two of the co-conspirators was concluded on June 4, 1948. Petitioner's trial commenced on June 7. At no time did defense counsel for Darey *move for a continuance or a change of venue* (R. 1232a).

(3) *Allegation:* A newspaper article quoting Judge Boyer's alleged commendation of the Foster-Zeitz jury on its verdict added to the "hysteria and prejudice * * * [so] * * * as to influence beyond a slight degree * * * the *panel* * * * " from which the [Darey jury was] selected (R. 8a).

There is no evidence that the jurors selected to try the Darey case read the article or subscribed to the "Daily Intelligencer" in which it was printed. During the period in question, this newspaper had an average circulation of 5,329 (R. 1216a), in a county of 107,715 population (Relator's Exhibit 124).

The reporter who wrote the story does not know whether it was accurate (R. 222a).

The alleged comment of Judge Boyer as contained in the newspaper article is:

"'I don't see how you could, *under the evidence*, have reached any other verdict,' Judge Boyer said.

"'Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge these days.'

"'The only hope of stemming the tide of such crime by youth is to enforce the law which you have indicated by your decision,' * * *." (Emphasis supplied) (R. 1071a-1072a).

Of this matter the Supreme Court of Pennsylvania said:

"* * * [t]here is nothing whatever to indicate that any statements [of Judge Boyer] were prejudicial to [Darcy's] having a fair or impartial trial."

(367 Pa. 130, 134)

The District Court found:

"To place these remarks in their proper context: A few moments earlier in the same court room Judge Keller in discharging the remainder of the May 24 panel commended them for their satisfactory verdicts, the last one of which was an acquittal on a charge of rape. * * *

"In convictions for murder the sole, absolute and final responsibility for the verdict and its consequences rests with the jury. Here no question was raised as to identity or as to the defend-

ant's participation in the robbery. The confessions were not repudiated; the testimony was uncontradicted. * * * " (R. 1227a)

(4) *Allegation:* An atmosphere of hysteria and prejudice against Darey began to form immediately after the murder; that it gradually built up during the five months intervening between the murder and his trial and reached its climax after the Foster-Zeitz trial when "hysteria and prejudice swept the County" and "was so general as to influence beyond a slight degree" the jury panel from which the Darey jury was selected (R. 8a).

The District Court found as a fact:

> "At no time during the [Darey] trial was there any need to call for order. There were no outbursts, no disturbances, no untoward incidents, either in or outside the court room, in Doylestown, or elsewhere throughout the county. None from December 22, 1947 down to or after the trial. At no time during either trial was the court room filled to capacity * * * " (R. 1212a-1215a)

In addition to a considerable number of respondents' witnesses who testified in conformity with the above findings, 7 of the *petitioner's* witnesses, including his brother and aunt, gave testimony to the same effect.[4] No contradictory evidence was produced.

[4] Damgosh, R. 132a-133a; Thomas, R. 228a-236a, 236a-237a; Trauch, R. 247a-249a; Hoffman, R. 268a-269a; Davis, R. 449a-450a; Ford, R. 497a-499a; Joseph Darey, R. 555a. Cf., also Babinski, R. 178a-179a, and Farrier, R. 195a-196a.

(5) *Allegations.* The Darcy jurors were *familiar* with (a) what had transpired at the Foster-Zeitz trial, (b) petitioner's connection therewith, (c) Judge Boyer's utterances and (d) public and newspaper comments thereon (R. 9a).

In the District Court, petitioner presented no evidence as to this allegation.[7] The voir dire examinations of the jurors and alternates, taken under oath, as contained in the trial record (Relator's Exhibit 5a, 5b, 5c, 5d, 5e), reveal[8] that each juror was asked specifically whether he or she had read of the case. The juror Landis answered that he had heard of the case, but did not read about it, and that he knew nothing about the facts or evidence (Appx. 20, 23). Horne answered "not very much" (Appx. 14). Fretz said he had read about it "and that's about all" (Appx. 25). Mason stated that he had read only the headlines (Appx. 33). Mrs. Shive and the alternate Mrs. Brillman each stated that they had read "some" (Appx. 49, 63). Bliss answered that she had "read the headlines but not in detail" (Appx. 52). Price said that he had read of the case but doesn't believe everything he reads (Appx. 37). The juror Fluck and alternate Hickey each stated that they did not read

[7] Sometime after trial the jurors were interviewed, apparently by petitioner's brother and sister (R. 848a); both the Supreme Court of Pennsylvania (367 Pa. 130) and the Court of Appeals condemned this practice. Alleged evidence gained thereby relative to penalty was ordered stricken (203 F. 2d 403, 419).

[8] The trial record is before this court. For the convenience of the Court the examinations of the jurors and alternates have been printed as an appendix to this brief.

about it (Appx. 42, 63). The juror Rhoel stated that she did not read of the case (Appx. 56). Pardoe and Bricher each stated that they had read of the case, including the Foster-Zeitz trial (Appx. 2, 7). Wyckoff stated that he had read of the verdict in the Foster-Zeitz trial in the Philadelphia papers (Appx. 11). All the jurors testified that they did not have a fixed opinion as to the guilt or innocence of the defendant and that they could render a verdict solely upon the evidence.

The defendant exercised only 10 of the 20 preemptory challenges allotted to him by the law (R. 1210a):

> (6). *Allegation:* During trial, Judge Boyer appeared in the Courtroom, *in view of the jurors*, and "at times" assisted and conferred with Judge Keller, and his presence reminded the Darey jurors of the Foster-Zeitz trial and the Judge's comments on the verdict thereof (R. 9a).

Pursuant to Section 2245 of the United States Code, 28 U.S.C. 2245, the Trial Judge, Honorable Hiram H. Keller, filed a certificate in which he stated (under oath):

> "20. During the Darey trial, the Honorable Calvin S. Boyer, the additional law judge, occasionally joined the undersigned and sat with him at the beginning of the several sessions of court devoted to the trial of the case, for the purpose of transacting miscellaneous business, after which he withdrew when the case was in progress. On several occasions, however, Judge Boyer re-

mained for brief periods while evidence was presented. On one of these occasions, the undersigned conferred with Judge Boyer upon a difficult question of law as to the admissibility of certain evidence introduced by the district attorney, to which defendant's counsel, Mr. Achey, objected, in view of a recent amending Act of Assembly. A side bar conference before the Judge's bench was called, at which time the question was discussed between the undersigned and the defendant's counsel, Mr. Achey, during which Judge Boyer made certain comments. Mr. Achey objected to Judge Boyer taking part therein, whereupon Judge Boyer expressed his opinion that the judges had the right to confer without being obliged to get consent of defense counsel (N. T. p. 831) and withdrew from the bench, and thereafter did not rejoin the undersigned on the bench during the remainder of the trial.

"21. The foregoing conference held at side bar was in low tones of voice and completely inaudible to any person on the jury or the alternates who were trying the Darcy case, and any statements that may have been made at this side bar conference were unheard, unknown and never called to the attention of the jury.

"22. *At no other time, during the course of the trial, did Judge Boyer assist, volunteer to assist, or make any suggestions to or otherwise aid the undersigned in the trial of this case.*" (Emphasis supplied) (R. 1138a-1139a)

As to the prevailing practice in the Courts of Bucks County relative to the opening of Court, the District Court found:

> "* * * each morning and afternoon at the opening of court both judges take the bench to entertain motions and other miscellaneous matters in the Criminal, Common Pleas—law and equity—and Orphans' Court. Once this work is completed, one of the judges, if engaged in a trial in that court room, remains on the bench; the other judge leaving to perform duties in another court room or in chambers. * * *" (R. 1235a)

There is no evidence that any of the Darcy jurors were influenced by Judge Boyer in any way.

The side bar conference in which Judge Boyer participated was reported in the trial record. On direct appeal at which time, in addition to trial counsel, Darcy was represented by Thomas D. McBride, Esquire, present Chancellor of the Philadelphia Bar, the matter was not assigned as error (*Commonwealth v. Darcy*, 362 Pa. 259).

> (7) *Allegation:* During Darcy's trial, Judge Boyer in sentencing another criminal (Robert White) condemned the practice of Philadelphia "thieves" coming into Bucks County, that such statement was carried in the press and his "*statement and actions* would be definitely reflected in the jury box and would be prejudicial to their relations in having a fair and impartial trial". (R. 9a-10a)

The theory of this contention as contained in the *petition* for writ of habeas corpus is that the alleged condemnation of "thieves" on June 12, 1948, suggested to the Darcy jury the verdict and penalty to be given petitioner. On the first appeal to the Court of Appeals, it is clear that the majority of the court so understood the contention (See opinion of Judge Biggs, 203 F. 2d 407, at p. 414, continuing footnote, N. 7, 8).

The District Court found that:

> "Once accepted the jurors were kept together, during the trial, under the watchful care and supervision of court officials (in Foster-Zeitz 3, in Darcy 4 uniformed tipstaves). The jurors were not permitted to see any newspapers, hear any radio, or see any television program. They were kept free from any outside influence or contact." (R. 1212a)

> "* * * the sentence [of White] was passed and the remarks made in a court room other than that in which the Darcy trial was progressing. The jurors in the Darcy trial knew nothing whatsoever as to the sentence and the remarks. What occurred could not possibly have, and did not in fact have, any effect whatsoever on the outcome of the Darcy trial. It did not reflect in any manner hysteria or prejudice on Judge Boyer's part toward any of the four defendants charged with murder." (R. 1239a)

5.

## SUMMARY OF ARGUMENT

Petitioner makes two sweeping allegations of denial of due process: (1) that his trial for murder took place in an atmosphere of hysteria and prejudice brought about by a newspaper campaign to secure the death penalty, and (2) that one of the judges of the county prejudiced the jury against petitioner. The State Supreme Court, the District Court and the Court of Appeals have all found that petitioner *failed to prove* the basic facts of his petition for writ of habeas corpus. Thus, respondents' argument is primarily factual.

(1)

This Court has held that if a court room proceeding is dominated by a mob, so that the jury is actually intimidated or if public passion is so great as to be irresistible by normal human beings serving as jurors, such a proceeding is a "sham" and due process is denied: *Frank v. Mangum*, 237 U. S. 309.

Darcy has attempted to bring himself within this rule; but the facts as found by the State and Federal Courts are that his trial was conducted with dignity and decorum and without any hostile congregation or demonstration at or near the court room, which during most of the trial was not even crowded. The trial was not attended by any threat of violence or any manifestation of hysteria. The jury was segregated

and without access to newspapers or other forms of communication.

The petitioner's attempted reliance on statements in newspaper articles as being true cannot prevail, because when offered for such purpose newspapers come within the exclusion of hearsay rule. The respondents have always objected to their use for such purpose. The only possible relevancy of such newspapers is to show that they created an atmosphere climaxed by some manifestation of prejudice. The record is clear that no such manifestation took place. The papers, of course, reported the crime, but during the five months intervening between the crime and petitioner's trial reporting was infrequent with a renewal of interest as the trial approached.

Significantly, the petitioner was represented by experienced counsel of his own choosing *who did not move for either a change of venue or a continuance.* The petitioner admits that no such motions were ever made but argues that the trial court should have changed the venue *sua sponte*. There is no authority in Pennsylvania for such action. Indeed, for a trial court to undertake such action would deny the defendant the constitutional right to trial by a jury from the "vicinage".

Witnesses called to show the alleged prejudiced feeling of the community were by the District Court found not to be credible or that their testimony failed to establish prejudice. The direct interest of several witnesses by reason of relationship to the petitioner is obvious. The testimony of all these witnesses was not oriented as to time, place or person and, at most,

shows only that there was indignation by reason of the murder. It would be a strange community if there was no indignation because of a murder. The petitioner offered no defense at trial and the evidence that he participated in a robbery-murder, together with his confession, firmly establish his guilt.

The respondents contend that the penalty was caused by the facts of the crime and that alone.

The jurors who actually tried the petitioner were subjected to an exhaustive voir dire examination by defense counsel. They testified that they could and would return a verdict on the evidence. The petitioner did not exhaust the peremptory challenges allowed him by law. There is no evidence of persons having intimidated the jurors or talked about the case with them either before they were sworn as jurors or during the trial.

(2)

The charge is also made that Judge Calvin S. Boyer prejudiced the jury trying petitioner. Judge Boyer had presided at the trial of Darcy's co-conspirators who were convicted and sentenced to death. The judgment and sentence in those cases have long since been affirmed. According to a newspaper story, Judge Boyer had commended the jury for its verdict *under the evidence*. There is no competent proof that the statement was made, but assuming it was, it does not indicate any personal prejudice on Judge Boyer's part. Of more importance, petitioner did not show that any of the Darcy jurors read the article nor that they were in any way prejudiced thereby.

Nevertheless, he assumes they did read it, and coupled with Judge Boyer's presence in the court room at times during petitioner's trial, he concludes the jury must have been robbed of its power and ability to make its decision on the evidence.

Prior to the daily beginning of petitioner's trial, both President Judge Keller and Judge Boyer sat on the bench for the disposal of routine business. How Judge Boyer's mere presence at such times affected the jury is left by petitioner to speculation. On one occasion Judge Boyer remained on the bench after petitioner's trial commenced and, at side bar, participated in a ruling on a question of law which ruling was not prejudicial to petitioner. Neither the ruling nor the participation were questioned on direct appeal. The evidence is clear that at no other time did he participate in the trial. There is nothing improper in having a two judge bench—even for an entire trial. In some counties in Pennsylvania two judges are *required* in a murder case. Judge Boyer did on occasion sit in the court room as a spectator in street clothes—at least fifty feet away from the jury. But there is no showing by petitioner that he said or did anything during such occasions prejudicial to Darcy. He was by no stretch of the imagination an overseer judge as argued by petitioner.

There is also an allegation that Judge Boyer, while a spectator, passed a note to the district attorney during the charge of the court. The District Court found that such occurrence did not take place, and that Judge Boyer was not even present in the court room at the time. The Court of Appeals refused to disturb this

finding. Assuming arguendo that it did occur, there is no showing that the jury observed it and no showing that what transpired thereafter was in any way prejudicial to petitioner. Significantly, although the Darcy family allegedly observed this event they never communicated it to anyone until approximately *three years after trial.*

In the final analysis the petitioner ignores the findings of fact and by assuming the existence of a state of hysteria and prejudice, and by assuming that Judge Boyer was prejudiced against him—neither of which assumptions were proved—he concludes that he was denied due process.

His present counsel admit that petitioner participated in a robbery during which a person was murdered (Brief, p. 7). Under the law of Pennsylvania he was guilty of murder of the first degree. The evidence produced at his trial caused the jury to fix the supreme penalty.

6.

## ARGUMENT

### I

### THE STATE AND FEDERAL RECORDS AND THE FINDINGS OF FACT MADE BY THE DISTRICT COURT DEMONSTRATE THAT PETITIONER FAILED TO ESTABLISH THE EXISTENCE OF AN ATMOSPHERE OF HYSTERIA OR PREJUDICE

#### A.

*The First Opinion of the District Court Properly Disposed of Petitioner's Allegations.*

Throughout this proceeding it has been respondents' position that the first opinion of the District Court (97 F. Supp. 930) properly disposed of petitioner's allegations on the basis of incontrovertible facts contained in the State record.

Although the instant case was disposed of prior to the opinion of this Court in *Brown v. Allen*, 344 U. S. 443, the District Court followed the procedure there outlined by Mr. Justice Frankfurter:

> "Fourth. When the record of the State court proceedings is before the court, it may appear that the issue turns on *basic facts* and that the facts (in the sense of a recital of external events

and the credibility of their narrators) have been tried and adjudicated against the applicant. *Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding and deny the application.* * * *" (Emphasis supplied) (p. 506)

In dismissing the petition the first time, Judge Murphy stated:

"Following the precepts of Johnson v. Zerbst, supra, 304 U.S. at page 465, 58 S. Ct. 1019; United States ex rel. Kennedy v. Burke, 3 Cir., 173 F. 2d 544, we examined the facts looking through form and into the heart and substance of the petition, the record in the trial and appellate courts, including the transcript of the testimony of the trial proceeding. We accept as true all of the well pleaded allegations of the petition, however much they may tax credulity, except to the extent that they conflict with the record and the trial transcript itself. * * *

* * * * * * *

"* * * it appears that petitioner is not entitled to a writ and that his petition is without merit (28 U.S.C.A. §2243; Walker v. Johnston, 312 U.S. 275, 284, 61 S. Ct. 574, 85 L. Ed. 830; Ex parte Quirin, 317 U.S. 1, 24, 63 S. Ct. 1, 87 L. Ed. 3) we have no alternative but to dismiss." (97 F. Supp. 930, 941-942)

On appeal the Court of Appeals remanded the case for hearing. "After full hearing and consideration of

al of the evidence" (R. 1246 sic, 224 F. 2d 504, 506), the District Court stated:

> "* * * we have fully and completely complied with the mandate of the Court of Appeals. With what result? Only to be more confirmed in our conclusions expressed in our opinion on May 17, 1951, that the defendant was afforded in form and in substance a fair and impartial trial in the Court of Oyer and Terminer in Bucks County, Pennsylvania, in June, 1948; that the allegations of the petition for habeas corpus are without support in the record and in the evidence; that the defendant was afforded due process of law under the Constitution of Pennsylvania and the Constitution of the United States." (R. 1240a)

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*B.*

*The Incontrovertible Facts Appearing in the State Record Completely Refute the Allegations of Hysteria and Prejudice.*

The refusal of a Trial Court to grant a motion for change of venue has been decided by this Court (under similar factual circumstances) to raise no due process question: *Buchalter v. New York*, 319 U. S. 427, 430. In the instant case at no time either before or during petitioner's trial did counsel of his own choosing[7] move for either a change of venue or a

[7] "* * * Attorney Achey, at one time an Assistant United States Attorney for the Eastern District of Pennsylvania and engaged in the practice of the law for some thirty years, was one of the ablest and foremost active trial lawyers of Bucks County. His ability as such was recognized throughout the

continuance.[8] In determining whether hysteria and prejudice against petitioner did exist, this Court has recognized the significance of failing to make such motions.

In *Stroble v. California*, 343 U. S. 181, Mr. Justice Clark said (at p. 194):

> "* * * But, *in an effort to determine whether there was public hysteria or widespread community prejudice* against petitioner at the time of his trial, *we think it significant* that two deputy public defenders who were vigorous in petitioner's defense throughout the trial, *saw no occasion to seek a transfer* of the action to another county on the ground that prejudicial newspaper accounts had made it impossible for petitioner to obtain a fair trial in the Superior Court of Los Angeles County." (Emphasis supplied)

Also, in *United States v. Rosenberg*, 200 F. 2d 666, the Court of Appeals for the 2nd Circuit observed (at p. 669):

> "* * * Their present position is obviously an after-thought, inspired by the hope of securing a

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eastern section of Pennsylvania (see Resp. Ex. No. 5). In his charge the trial judge described him as 'able and learned'; the Supreme Court of Pennsylvania (367 Pa. at 133) as 'a highly reputable attorney of his own (Darcy's) choosing, eminently qualified from the standpoint of ability, experience and industry.' Attorney Power 'while a young man with less experience was a very good trial lawyer' (Resp. Ex. No. 5)." Opinion of District Court (R. 1228a).

[8] As to the refusal to grant a continuance see *Avery v. Alabama*, 308 U.S. 444.

new trial after having exhausted all hope of reversing the verdict by appeal and petitions for certiorari. The excuse offered by counsel for the Rosenbergs is that he did not realize at the date of the trial the extent and the inflammatory character of the publicity as it could not have been revealed to him 'by the usual sporadic reading of an average newspaper reader,' and he was so busy that he 'read the newspapers' infrequently. *But if he did not realize it, there is no reason to suppose that the jury was more seriously affected.* * * *." (Emphasis supplied).

See also, *United States ex rel. Bongiorno v. Ragen*, 7 Cir., 146 F. 2d 349, 352.

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C.

*The Federal Court Proceedings Confirm the State Court Record as to Hysteria and Prejudice.*

1. *On the question of a change of venue and continuance.*

Petitioner argues that he was denied due process because the State court did not *sua sponte* change the venue or continue his trial. Significantly, no authority for this proposition is cited. Article I, Section 9 of the Constitution of Pennsylvania secures to a defendant the right to a speedy public trial by an impartial jury "of the vicinage". Where defense counsel has made no request for a judge to change the venue of his own volition would violate this constitutional right. The District Court in the first opinion was aware of this proposition:

"There is a limit however to which a trial judge or prosecuting attorney may go in protecting a defendant's interests. See Powell v. Alabama, supra, 287 U. S. at page 61, 53 S. Ct. 55; cf. Hickman v. Taylor, 329 U.S. 495, at pages 510-511, 67 S. Ct. 385, 91 L. Ed. 451. Defense counsel has the right to work with some degree of privacy, free from intrusion from the trial judge or prosecuting attorney. *If the trial judge or prosecuting attorney here attempted sua sponte to interfere in any manner with defendant's choice of counsel, his strategy or conduct of the defense, it would have been reversible error.* Cf. United States v. Bergamo, 3 Cir., 154 F. 2d 31." (Emphasis supplied) 97 F. Supp. 930, 940)

The prevailing view is that a court on its own motion may not order a change of venue: 32 C. J. S., Venue, Section 155; *State ex rel. Keogh v. Gilmore* (Ohio), 39 N. E. 2d 860.

Further Article III, Section 23 of the Pennsylvania Constitution provides:

"The power to change the venue in civil and criminal cases shall be vested in the courts *to be exercised in such manner as shall be provided by law.*" (Emphasis supplied)

This provision is carried into effect by the Act of March 18, 1875, P. L. 30, 19 Purdon's Penna. Statutes Annotated, Section 551 et seq. Section 1 of this act provides, in part:

"In criminal prosecutions the venue may be changed, *on application of the defendant or de-*

*fendants*, in the following cases: . . . . " (Emphasis supplied)

Under most limited circumstances, which have no application here, the Commonwealth may also move for a change of venue: *Commonwealth v. Reilly*, 324 Pa. 558, 571, 188 Atl. 574.

Petitioner's brief attempts to convey the impression (p. 64) that Darcy personally had not waived the right to ask for a change of venue, and that he was not permitted to explain that he had not done so. There is no evidence to support such contention. Darcy did not testify at trial (R. 1223a) nor at the hearing in the District Court (R. 634a-635a). Indeed, his counsel objected when the District Judge asked him whether he approved of the efforts of his present counsel (R. 635a, 741a).

2. *On the Question of the "Atmosphere" at the Trial of Petitioner.*

It is petitioner's contention that an atmosphere of hysteria and prejudice against him began to form immediately after the murder; that it gradually built up during the 5 months intervening between the murder and his trial and reached its climax after the Foster-Zeitz trial when this so-called hysteria and prejudice "swept the County of Bucks" and "was so general as to influence beyond a slight degree" the panel from which the Darcy jury was selected (R. 8a). This is an attempt to bring himself within the rule that a trial conducted under circumstances rendering the proceedings a mere "sham" cannot be constitutionally sustained: *Frank v. Mangum*, 237 U. S. 309;

*Moore v. Dempsey*, 261 U. S. 86; *Powell v. Alabama*, 287 U. S. 45, and *Shepherd v. Florida*, 341 U. S. 50. However, Darcy has utterly failed to establish any of the circumstances in those cases, or any other circumstances from which it can be concluded that his trial was not conducted in conformity with the constitutional concepts of due process.

In the cases above referred to there were *manifestations* of public sentiment hostile to the defendant *at his trial*. In the present case, no manifestation was disclosed by the evidence and the District Court so found:

> "* * * * [A]t no time during the [Darcy] trial was there any need to call for order. There were no outbursts, no disturbances, no untoward incidents, either in or outside the court room, in Doylestown, or elsewhere throughout the county.

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[9] *Frank v. Mangum*—Manifestations of public sentiment hostile to defendant sufficient to influence jury, to wit: disorder in and about court room; admonitions by court to keep order; threat to clear court room; spectators applauded colloquy between counsel; mob scene; cheering in streets while jury being polled.

*Moore v. Dempsey*—Trial conducted under pressure of a mob; large crowds, irresistible wave of public passion; trial lasted three-quarters of an hour—jury out five minutes.

*Powell v. Alabama*—Military guard on prisoner and around court house [to prevent mob rule] trial took place in atmosphere of tense hostile and excited public sentiment.

*Shepherd v. Florida*—Press release by sheriff, read or heard of by jurors, mob gathered at jail—burned home of defendant's father, other Negroes moved to prevent lynching; cartoon depicting four electric chairs, newspapers *demanded* death penalty.

None from December 22, 1947 down to or after the trial. At no time during either trial was the court room filled to capacity * * *" (R. 1212a-1215a)

Further the opinion of the Court of Appeals states:

"* * * on the evidence adduced in the district court it is clear, as that court found, that relator's trial was conducted with dignity and decorum and without any hostile congregation or demonstration at or near the place of trial. Indeed, during much of the trial the courtroom was not crowded. Certainly, the trial was not attended by any threat of violence or manifestation of mass hysteria. Moreover, a clear and elaborate showing was made to the district court that throughout relator's trial the jury was kept under strict guard, apart from other persons and without access to newspapers, radio, television or any other source of news or opinion." (R. 1246a-1247a)

*3. On the Question of Newspaper Articles and Editorials and their Alleged Creation of Hysteria and Prejudice.*

Throughout this proceeding, petitioner has placed extreme reliance upon newspaper stories as creating an "atmosphere" of hysteria and prejudice against him. A perusal of his brief discloses that they are not only being used in an attempt to attack the Darcy jury, but also as proof that the events depicted in the articles are true. The Commonwealth objected to the introduction of these articles as evidence of either contention (R. 217a-219a).

The law is clear that when submitted for the purpose of establishing facts, newspapers come within the exclusion of the hearsay rule: *State v. Lost*, 192 Wash. 651, 74 P. 2d 458; *United States v. Jaffe*, (D. C.), 98 F. Supp. 191; *Butler v. Stockdale*, 19 Pa. Superior Ct. 98; 32 C. J. S., Evidence, Section 726; *Poretto v. United States*, 5 Cir. 196 F. 2d 392, 395; *Alexander v. United States*, 9 Cir. 181 F. 2d 480, 484.

As to their use in an attack on the Darcy jury, it is submitted that without evidence *tending to show that they were read by jurors*, the articles should have been excluded as being immaterial: *Stewart v. United States*, 8 Cir., 300 Fed. 769, 778-779. See also *Stroble v. California*, 343 U. S. 181, 194.

The only possible theory upon which they can be considered relevant is to show that they influenced and excited the community to some *manifestation* of prejudice which was evident at Darcy's trial to the jury. (See the opinion of Chief Judge Biggs on the first appeal, with reference to *Shepherd v. Florida*, supra, 203 F. 2d 407, 415.) However, the overwhelming weight of the evidence is to the effect that Darcy's trial was a calm, dignified judicial proceeding unmarred by outbursts, violence mob rule, threats, noise, unruly crowds or any other circumstances which could be characterized as making the trial a sham. In short, there were no incidents or circumstances upon which to base a finding that there was created an atmosphere of hysteria and prejudice "prevailing at his trial" (Mandate, 203 F. 2d 407, 409).

As to the possible relationship between the newspapers and the jury, there is *no evidence* that the

Darcy jurors read more or less about the case than their answers on voir dire indicate. There is no evidence connecting these articles to the Darcy jurors in any way, shape or form, to show perjury, bias, prejudice or fraud. In fact, the record today on this score is the same as it was in June, 1948, when the voir dire examinations were made. Despite this lack of direct evidence, relator adds together a series of possibilities and innuendoes and exactly as in *Stroble v. California*, supra, "* * * *[H]e asks this Court simply to read those stories and then to declare, over the contrary findings of [State] courts, that they necessarily deprived him of due process* (343 U. S. 181 at 195)". In essence, this Court is asked to *speculate* on what the Darcy jury *did* read from what it *could* have read and then to conclude that the Darcy jury was prejudiced and he was denied due process. The judgments of society are not to be given such cavalier treatment. Petitioner's burden, which he did not meet, is more:

> "* * * it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, *and that it be sustained not as a matter of speculation but as a demonstrable reality*": *Adams v. McCann*, 317 U. S. 269, 281; *Buchalter v. New York*, 319 U. S. 427. See also *Stroble v. California*, supra. (Emphasis supplied)

As stated before, other than the disclosures of the voir dire examinations, "there is no proof that the jury or any member of it saw or heard the stories mentioned". In determining that a jury was not preju-

diced by newspaper stories, the first test is, did they read the articles: *United States v. Griffin*, 3 Cir., 176 F. 2d 727 at 731. The same reason is given in *Stroble v. California*, supra, 343 U. S. 181, 194-195. See also, *Stewart v. United States*, supra, and *United States v. Katz*, 3 Cir., 173 F. 2d 116, 117.

Although it is highly improbable, assume for the sake of argument that the Darcy jurors *read* all the articles to which petitioner refers.[10] First it is well settled that the mere reading of newspaper accounts does not in and of itself disqualify: *Reynolds v. United States*, 98 U. S. 145, 155-156; *Holt v. United States*, 218 U. S. 245; *United States v. Moran*, 2 Cir., 194 F. 2d 623; *Finnegan v. United States*, 8 Cir., 204 F. 2d 105.

In the Griffin case, supra, defense counsel directed the court's attention to newspaper stories *about the trial* (apparently the jury was not locked up), and just prior to recess the Court told the jury:

> "Now, again I want to emphasize that it is the evidence you hear, in this court room, not *what you might happen by chance to hear or read elsewhere;* e.g., the defendant Griffin is not standing trial for bribery. The charge is conspiracy to defraud the United States. This is the charge that must be proved. It is the practice of some Trial Judges to admonish the Jury each trial day. Well, I think this Jury consists of intelligent ladies and gentlemen, you have integrity and

[10] Such an assumpsition would convict the jurors of perjury and petitioner makes no such charge.

honesty and I am not going to admonish you any further in this trial unless the occasion should arise whereby it should become absolutely necessary for me to do so.'" (176 F. 2d. 727, 731). (Emphasis supplied).

Judge McLaughlin stated with reference to this statement by the trial court:

"* * * Complaint is made that the Court in its above admonition did not directly tell the jury not to read the newspapers or listen to the radio. In our judgment, the Court was entitled to consider as he did, that he was dealing with an intelligent American jury of honesty and integrity. *He told its members plainly that they were to decide the case only on the evidence they heard in the court room, not what they 'might happen to hear or read elsewhere'.* Immediately thereafter, inconspicuously and effectively, he dealt with the objectionable articles saying, '* * * e. g., the defendant Griffin is not standing trial for bribery. The charge is conspiracy to defraud the United States. This is the charge that must be proved'. Strong indication that what the Court said disposed of the incident in fair and practical fashion is shown by the fact that *the case is barren of evidence that any member of the jury was at all affected or influenced by newspaper or radio stories of the trial proceedings.* As Mr. Justice Holmes said in Holt v. United States, 218 U. S. 245, at page 251, 31 S. Ct. 2, at page 6, 54 L. Ed. 1021, 20 Ann. Cas. 1138: 'If the mere opportunity for prejudice or corruption is to raise a presumption

that they exist, it will be hard to maintain jury trial under the conditions of the present day.'" (176 F. 2d 727, 731) (Emphasis supplied).

In the instant case, the jury was segregated, and the evidence is that they did not see newspaper stories during the trial. As to articles appearing before trial, *defense counsel did not raise any objections to the court,* but substantially the same admonition given by the trial judge in the *Griffin* case was given by Judge Keller in his charge to the Darcy jury (R. 1225a).

Petitioner has shown nothing to indicate that the Darcy jury was not "an intelligent American jury of honesty and integrity."

Third, again assuming arguendo that the jurors read the articles, were they, in fact, prejudiced by the publicity? This question is asked and answered in the negative in *Stroble v. California,* supra and *United States v. Rosenberg,* supra. A comparison of those cases with Darcy reveals that the facts, indeed, the almost synonymous facts compel a negative answer here.

| Facts | Darcy | Stroble | Rosenberg |
|---|---|---|---|
| (1) Defendant alleges communal prejudgment of guilt | Yes | Yes | Yes |
| (2) Newspaper publicity before arrest | No | Much | Some as to crime, but not specifically as to defendants |
| (3) Newspaper publicity at arrest | Yes | Yes—excerpts and text of confession | Yes |

| Facts | Darcy | Stroble | Rosenberg |
|---|---|---|---|
| (4) Newspaper publicity between arrest and trial as to defendants | Infrequent | Infrequent | Infrequent |
| (5) Newspaper publicity between arrest and trial as to crime in general | Yes | Yes | ..... |
| (6) Period between arrest and trial | 5½ Mos. | 6 weeks | Julius 8 Mos. Ethel 7 Mos. |
| (7) Move for change of venue | No | No | No |
| (8) Move for continuance by defense | No | No | ..... |
| (9) Extensive voir dire examination | Yes | Yes | Yes |
| (10) Defendant exhausts preemptory challenges | No | ..... | No |
| (11) Period between trial and raising question of prejudicial publicity | 2 Yr., 9 Mos. | Immediately on motion for new trial | 1 Yrs. 6 Mos. U. S. v. Rosenberg (D.C. S.D. N.Y.) 108 F. Supp. 798, 800 |

It is true, of course, that no other related trials preceded the Stroble and Rosenberg cases. However, in the Rosenberg case, during the trial, the *prosecution* "timed" the release of an indictment against one Perl, for perjury committed in denying that he knew defendants. This was held not to be prejudicial (200 F. 2d 666, 669-670).

4. *Analysis of the Newspaper Articles and Editorials and Radio and Television.*

*Editorials:* The District Court fully and correctly disposed of the editorials to which petitioner referred (Ft. N. T. 46 & 47, R. 1218a-1223a). He now contends that there was an editorial or newspaper policy designed to secure the death penalty for these defendants.

Between the time of the murder and the beginning of Darcy's trial, he relies upon nine editorials as showing this policy. Of these, only two refer to Darcy, Foster and Zeitz, and then by content and not by name. Relator's Exhibit 40 (R. 994a) which appeared on *February* 16, 1948, states only that they are charged with murder and one eighteen year old (not Darcy) is accused of pulling the trigger in the murder case. Relator's Exhibit 42 (R. 998a) appearing almost *four months* before trial also refers to these defendants indirectly. However, it is difficult to see how it is evidence of an out of court campaign to secure the *death* penalty since it concludes that their arrest should discourage forays into the county "*especially if they are convicted and sent away for impressive periods.*"

Of the other seven editorials we find that one appeared nine days after the crime (Exhibit 22, R. 974a-975a) and refers to a Philadelphia case and suggests professional jurors. Another (Exhibit 49, R. 1005a) renews the suggestion. This appeared one month before the trial and is the closest to trial of this group of nine.

The remaining five in no way indicate a pattern or policy calculated to secure the death penalty for these defendants.[11]

*News Stories.* In the final analysis, Petitioner's main objection to the news stories is as to descriptive words; and of these they are descriptive of facts. Can he deny that he was one of a "quartet of bandits, all Philadelphians", who "shot three men" and that the four were "gunmen" who did "shoot it out" and became involved in a "four-way murder case" after being captured in a "wild chase?"

These facts came out at his trial (Cf., *Stroble v. California*, supra, 343 U. S. 181 at 195), and there has never been any showing by Petitioner that these words, or these articles, affected the deliberations of the jury, i.e., that these articles rather than the evidence produced at trial resulted in the death penalty.

The words "werewolf", "fiend", "sex-mad killer", "sex crimes", and "mad dog", appeared with reference to the defendant Stroble *within six weeks of his trial in metropolitan Los Angeles newspapers* but, as here, there was no showing of how it affected the jury.

As to the editorial appearing in the Philadelphia Evening Bulletin on June 7, 1948, and which was re-

[11] As to time, they are: January 16, 1948 (No. 25, R. 979a); February 2, 1948 (No. 31, R. 982a-983a); February 11, 1948 (No. 38, R. 992a-993a); April 2, 1948 (No. 46, R. 1001a); April 17, 1948 (No. 48, R. 1003a-1004a). Only an excerpt of Exhibit 25 is printed by Petitioner, out of context and the District Court much more fully discusses the exhibit in Footnote 47, R. 1222a.

printed in the Doylestown Daily Intelligencer on June 8, 1948 (R. 1086a), the eight jurors selected on June 7, 1948, could not have read the original or the reprint, since the evidence shows they were under the supervision of the court and were segregated. As to the remaining four, who were selected the following day, it is self-evident from their answers on voir dire that they knew nothing about the case, or if they did, they had no fixed opinion thereon and could and would render a verdict on the law and evidence as produced at trial. It is far too late now to attack the jurors on their answers given on voir dire. See cases cited by the District Court (R. 1230a) and *In Re Schneider*, 148 U. S. 162.

Finally, as to *all* articles appearing after the Darcy jury was selected, it is clear that they could have no effect *upon the jurors* since the uncontroverted evidence is that the jury was segregated at all times in the charge of four tipstaves, and that they did not read any newspaper during the trial.

*Radio and Television:* Petitioner states, contrary to the District Court's finding (R. 1216a), that there was wide radio and television coverage of the trial (Brief, p. 28) by reporters for the radio station covering the trial and reporting the news thereof at each noon and evening broadcast (Brief, p. 55). He again relies on newspaper articles (R. 1126a-1128a) *as being true*. The only witness called to show newspaper coverage, William Lynch, could only "presume" that the reports of the proceedings were broadcast and knows they didn't have a full time news writer to cover a trial (R. 287a-288a). This is but another ex-

ample of the danger in using hearsay newspaper articles as proof of essential facts. The opinion of the Court of Appeals states:

> "* * * relator has relied largely upon the daily newspaper accounts and editorial comments published in the community during the trial of two of relator's alleged confederates, which ended only three days before he himself was required to stand trial. We have examined all of this material. The evidence does not indicate, as relator would infer, that the jurors who tried relator were waiting in or near the courtroom during the period of the trial of his confederates. At most it indicates that during the two weeks immediately preceding relator's trial the community in general had experienced a revival and quickening of interest in the homicide attended by many expressions of indignation against its perpetrators. But it does not appear that feeling ran so high or that hostility toward the relator was so intense and so general as to make it seem incredible that the search for a satisfactory jury would yield twelve persons as open minded about this case as the jurors here claimed to have been. * * *" (R. 1247a-1248a)

Two of the dissenting judges also agree with the majority on this point (R. 1252a-1253a).

*5. On the Question of Alleged Feeling in the Community.*

Petitioner called 7 witnesses in an effort to establish "general hysteria and prejudice which swept the

county *as the result* of the Foster-Zeitz verdict" (R. 8a). He further states in his brief (p. 58) that this atmosphere reached its climax at the Darcy trial.

Petitioner's analysis of the testimony of these witnesses refers to remarks which are not oriented as to *time, place or person* and which remarks are rank hearsay. The District Court admitted the testimony over the objection of respondents only because of the mandate (R. 167a-168a).

Actually eight witnesses gave some testimony of this type. The direct interest of two is obvious: Patterson, Zeitz's aunt (R. 392a-418a), whom the District Court just did not believe (R. 1214a) and Heckman, Darcy's sister. Three of the witnesses had at least an indirect or prejudiced interest.[12] One, Davis (R. 431a), was unworthy of belief (See opinion, R. 1212a, Ft. Nt. 39, and especially R. 1215a) as the District Court specifically found in one instance. (See Ft. Nt. 57 to opinion, R. 1238a.)

Reverend Damrosh knew Harold Foster and would not be specific as to expressions of the public concerning Darcy (R. 125a). He could not be pinned down and refused to say what was the public's opinion (R. 126a-128a). He was not willing to say there was prejudice (R. 130a). He attended one session of the Zeitz-Foster trial and one of Darcy and could not specify his impressions before, during and after trial (R. 131a-132a). He stated there was "antagonism"

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[12] Farrier, attorney for Zeitz (R. 181a); Price, a friend of Darcy's sister (R. 314a); Hoffman, who wrote a letter to the Governor seeking clemency (R. 253a).

towards defendants (R. 130a) but, in response to questions by the court (R. 132a-133a) he admitted that there was no violence or going near the court house with guns or clubs, nor any disturbances that he even heard of. In short, this "antagonism" was displayed only vocally and perhaps a display of emotion.

Reverend Babinski lived in Feasterville, the scene of the crime (R. 160a) and although he heard remarks, he could not remember when, but it may have been in March, April, January or February and "possibly" very shortly after the offense occurred (R. 174a). He could not give the names of any men as having uttered any of the remarks which he heard (R. 177a). However, he did say that there were "no expressions of threats or violence in the sense that anybody was going to organize against the defendants." Further, in response to a question by Petitioner's counsel, he could not answer conscientiously whether there was any *change in feeling after the Foster-Zeitz trial and just before the Darcy trial* (R. 166a). (Remember, Petitioner alleges that at this period, hysteria and prejudice *swept* the County.)

The witness, Farrier, Zeitz's attorney on appeal, testified that when people knew he represented Zeitz, they engaged him in conversations which were "not polite" (R. 184a), but he later admitted to *Petitioner's counsel* that he talked with some prosecution witnesses who appeared at the trial (R. 201a-202a) and a number of persons who were in the tavern (R. 184a). One of these, Morris Phillips, told the witness very shortly after the crime occurred, "They ought to burn."

Phillips was a victim of the robbery which occurred when the murder was committed (R. 203a-204a), and when asked whether he raised on appeal any question of Phillips' testimony at the Zeitz trial [in view of his statements] he replied, "Heavens, no." In short, he did not consider the statement as evidence of "hysteria" but rather a human reaction of one who had been wronged in a horrible sequence of events.

Also, Mr. Farrier couldn't recall when the conversations were held, was not capable of giving an opinion as to public sentiment and stated that some of the remarks were made facetiously "because they liked to ride me." He further stated that "the very opinion and expression of opinion *was not* repeated over and over again" (R. 186a-188a). Finally, he stated he did not blame people for holding their opinions (R. 204a) and he investigated the case to prepare to save Zeitz "from the chair, if possible (R. 194a)." Mr. Farrier was an experienced lawyer, having handled about two hundred cases before this court and the appellate courts of Pennsylvania (R. 197,-198a). His testimony reveals that he was not worried about any alleged hysteria and prejudice. Nevertheless, he was worried about the penalty. Why? Because of the facts of the crime.[13]

The witness, Dr. Hoffman, as stated before, examined Darcy (R. 264a) and wrote a letter to the Board

[13] In a protracted proceeding, such as this, there is a tendency to forget to view the allegations, the evidence and the result in light of the established facts of the crime itself. We respectfully refer to the statement of the case, *supra*, page 6, and see also Ft. Nts. 15 and 16 to opinion of the court below (R. 1203a-1204a).

of Pardons in his behalf (R. 269a), and yet when asked (R. 268a-269a):

> "By Judge Murphy: The question is, Doctor, you a trained psychiatrist and neurologist, can you tell of one incident that you can recall in connection with any of these cases in Doylestown about the time of the trial? Do you understand the question?
>
> By The Witness: I understand the question. I am trying to find out if he means a demonstration.
>
> By Judge Murphy: Any incident that you can call to memory right now?
>
> By The Witness: No."

At most, this witness gave hearsay testimony about conversations, many of which he precipitated (R. 268a), and he did not particularize as to time or person (R. 265a-267a).

The testimony of the witnesses, Price and Davis, as well as that of the directly interested witness, Heckman, is subject to the same defect of vagueness.[14] As the District Court below said, "generally the witnesses could not recall any particular person or the time or place of any particular remark, or exactly what they heard in context (R. 1213a)."

Assuming arguendo, that the testimony of these witnesses is completely credible, the evidence they gave does not support the conclusion that the feeling

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[14] Price, R. 321a, 328a-329a, 332a-338a; Davis, C.T., R. 435a-437a; Heckman, R. 594a-601a.

of people, in general, amounted to a state of hysteria and prejudice, nor that the feeling grew in intensity reaching its climax at the Darcy trial. Their testimony fails to establish any pattern of behavior as to the time of the occurrence in relation to the trials (increase or decrease) and is devoid of pattern as to population or area involved.

In an effort to bolster his claim as to these witnesses, Petitioner's counsel makes the ridiculous assertion (Brief, p. 60) that the Commonwealth did not contradict this "evidence." The very statement points up the violation of the hearsay rule—for how is it possible to contradict alleged statements of unknown persons allegedly made at unknown times and places. Further, since no witness placed them in the vicinity of such statements, it is impossible to determine how (as his brief states, p. 60) respondents' witnesses could testify that they had *not* heard such alleged expressions.

6. *On the Presence of the Darcy Jury Panel During the Foster-Zeitz Trial.*

Although petitioner attempted to prove and presently contends that the jurors who served on the trial of David Darcy were present in court as a jury panel for portions of the trial of the co-defendants, Foster and Zeitz, the District Court rejected this contention and found as a fact that the jury panel from which the Darcy jury was ultimately selected did not appear in court until June 7, 1948 (R. 1208a), the date that the selection of the Darcy jury commenced. This finding was not questioned by the Court of Appeals in either the majority or dissenting opinions.

Certain parts of the records in the Courts of Oyer and Terminer of Bucks County indicated that the panel was originally summoned to appear on June 1, 1948 at which time the Foster-Zeitz trial was still in progress. However, partially at the suggestion of the District Court (R. 723a-724a), the original warrants and pay records of the jurors who served on the Darcy trial were introduced into evidence by the Commonwealth. These records conclusively show that the jurors were actually present in court as jurors only on the days during which the Darcy jury was being selected and during the Darcy trial (R. 796a, et. seq.) In addition, the certificate of Judge Keller completely clarified the fact that although originally summoned to appear June 1, 1948, the jurors did not in fact appear until June 7, 1948 (R. 1135a).

Of course, as an individual, a juror could have been present as a spectator during all or portions of the Foster-Zeitz trial, as that trial was open to the public as required by the Constitution of Pennsylvania. There is, however, no evidence, from which an inference could be drawn that any of the jury selected to try the Darcy case were present during any of the Foster-Zeitz trial. The exhaustive voir dire examinations refute such a contention. Only one prospective juror, William Slaughter, who was a resident of the county seat (R. 1143a) stated on voir dire examination that he attended as a spectator "several days off and on" during the Foster-Zeitz trial (R. 1143a). He was excused from serving on the jury by agreement of counsel. The colloquy concerning the excusing of Slaughter as a juror is indicative of the meticulous

fairness in which the trial was conducted throughout, by the trial court and the district attorney (R. 144a). Had defense counsel any reason to believe that the entire panel had been present during any portion of the Foster-Zeitz trial, he could have and would have challenged the entire array. Similarly, if any other prospective juror had been present during any portion of the Foster-Zeitz trial, this fact would have been brought to light during the thorough voir dire examinations. It might be noted that if, in fact, hysteria and prejudice was as great as petitioner now claims, it seems strange that only one of the entire panel of jurors examined on voir dire was sufficiently interested to attend the public trial of Foster and Zeitz and then to attend only "off and on". This in itself shows that the panel of jurors from which the Darcy jury was ultimately selected, as individual citizens were not sufficiently aroused by the alleged publicity to attend the trial.

## II.

## THE STATE AND FEDERAL RECORDS AND THE FINDINGS OF FACT MADE BY THE DISTRICT COURT DEMONSTRATE THAT PETITIONER FAILED TO ESTABLISH THAT JUDGE CALVIN BOYER IN ANY WAY PREJUDICED THE DARCY JURY OR INFLUENCED ITS DELIBERATIONS

### *A.*

### *Analysis of the Allegations of the Petition as They Refer to Judge Boyer*

Paragraph 11 of the petition (R. 7a-10a) attempts to link Judge Boyer with the general allegations of hysteria and prejudice and he is attacked in the following particulars:

1. That he "praised" the Foster-Zeitz jury for its verdict—which alleged statement was carried by the press (R. 8a).

2. That he appeared at different times in the court room where he *could* be seen by the Darcy Jury (R. 9a).

3. That he sat on the bench "at times" and assisted and conferred with Judge Keller (R. 9a).

4. That his presence reminded the Darcy jury of the Zeitz-Foster trial *and* of his expressed

"commendations" attitude toward the verdict (R. 9a).

5. That in sentencing another criminal he made a statement prejudicial to petitioner which was carried in the press *and* his statements and actions would be reflected in the jury box (R. 9a-10a).

In addition, it is contended that during the charge of the court, Judge Boyer wrote and passed a note to the district attorney, who stood up and addressed the court.

The same allegations were made to the Supreme Court of Pennsylvania and were rejected:

> "We do not deem it necessary to comment upon the criticism made of Judge Calvin S. Boyer beyond stating that *there is nothing whatever to indicate that any statements or actions on his part were prejudicial to relator's having a fair and impartial trial.*" (Emphasis supplied) (Commonwealth ex rel. Darcy v. Claudy, 367 Pa. 130, 134).

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*B.*

*Newspaper Story Commending Foster-Zeitz Jury*

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It is contended that a newspaper article quoting Judge Boyer's alleged commendation of the Foster-Zeitz jury on its verdict (Exhibit 78, 1071a-1072a) added to "the hysteria and prejudice • • • [so] • • •

as to influence beyond a slight degree * * * the panel * * * from which the [Darcy jury was] selected (R. 8a).

This article is subject to the same defects as the other newspaper stories previously considered (1) that it is hearsay, and (2) that there is no evidence from which even an inference can be drawn that the jurors read the article or even subscribed to the paper in which it was printed.

Keeping in mind that the evidence substantiates the finding of the District Court that petitioner wholly failed to establish any "general feeling of hysteria and prejudice"—or even a pattern relating thereto, this newspaper story is but an isolated occurrence which petitioner would forge into a nonexistent chain of events which he alleges reached its climax at the Darcy trial—a trial which the uncontroverted evidence shows was a calm judicial proceeding.

Again, petitioner assumes from this hearsay article that Judge Boyer did make such statement and that it expressed his *personal sentiments* against all the defendants and was "necessarily" circulated and broadcast throughout Bucks County. First, there is *no* evidence that the alleged statement was broadcast. Second, assuming the article is true, an objective reading thereof does not reveal any personal prejudice on the part of Judge Boyer. Third, the newspaperman who wrote the story does not know whether it was accurate (R. 222a). Fourth, it cannot be argued that such statement would have disqualified Judge Boyer from acting as the *trial* judge if he had been the only

judge in Bucks County. In discussing this article, the court below said:

> "To place these remarks in their proper context: A few moments earlier in the same court room Judge Keller in discharging the remainder of the May 24 panel commended them for their satisfactory verdicts, the last one of which was an acquittal on a charge of rape. An opinion expressed by Judge Boyer in his charge as to the proper penalty was reported on June 4, Rel. Ex. No. 76.
>
> "In convictions for murder the sole, absolute and final responsibility for the verdict and its consequences rests with the jury. Here no question was raised as to identity or as to the defendant's participation in the robbery. The confessions were not repudiated; the testimony was uncontradicted. * * * " (R. 1227a).

Indeed, under this theory, if correct, the Judges of the Supreme Court of Pennsylvania and the Court of Appeals could be disqualified:[15]

> " * * * In the opinion of the Supreme Court of Pennsylvania Zeitz 'showed extreme callousness and brutality in his actions and his remarks during the course of the holdup'; Com. v. Zeitz, 364 Pa. at 296; the three defendants were described as 'bandits'. Id. p. 296. And see opinion Chief Judge Biggs, 203 F. 2d at 419, 'The crime * * * admitted-

[15] It is true that the remarks of the appellate court were made after trial, but there is no evidence that Judge Boyer's alleged statement was heard or read by the Darcy jury.

> ly committed was a brutal one, meriting severest moral condemnation * * * *'; Com. v. Darcy, 362 Pa. at 278 'Under this evidence for a jury not to have found that these men were engaged in a common law robbery would have been perverse.'" (R. 1227a)

If Boyer would have been the trial judge, his *opinion* as to the Darcy case, given in his charge, would have been proper: *Commonwealth v. Simmons*, 361 Pa. 391, 405-410, 65 A. 2d 353.

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## C.

### *Presence in the Court Room*

*On the Bench.* The practice in Bucks County at the time of the Darcy trial and for years prior thereto was for both Judge Keller and Judge Boyer to open court each morning for the transaction of miscellaneous business. During the Darcy trial, after the completion of this business, Judge Boyer left the bench shortly thereafter (R. 648a, 665-666a, 726a-727a, 734a, 875a). The clerk of courts tesfified that Boyer left every morning and did not return, "If he did it would have been his duty to record it (R. 370a-375a)." Further, the certificate of Trial Judge Keller states:

> "20. During the Darcy trial, the Honorable Calvin S. Boyer, the additional law judge, occasionally joined the undersigned and sat with him at the beginning of the several sessions of court devoted to the trial of the case, for the purpose

of transacting miscellaneous business, after which he withdrew when the case was in progress. On several occasions, however, Judge Boyer remained for brief periods while evidence was presented. On one of these occasions, the undersigned conferred with Judge Boyer upon a difficult question of law as to the admissibility of certain evidence introduced by the district attorney, to which defendant's counsel, Mr. Achey, objected, in view of a recent amending Act of Assembly. A side bar conference before the Judge's bench was called, at which time the question was discussed between the undersigned and the defendant's counsel, Mr. Achey, during which Judge Boyer made certain comments. Mr. Achey objected to Judge Boyer taking part therein, whereupon Judge Boyer expressed his opinion that the judges had the right to confer without being obliged to get consent of defense counsel (N.T., p. 831) and withdrew from the bench, and thereafter did not rejoin the undersigned on the bench during the remainder of the trial.

"21. The foregoing conference held at side bar was in low tones of voice and completely inaudible to any person on the jury or the alternates who were trying the Darcy case, and any statements that may have been made at this side bar conference were unheard, unknown and never called to the attention of the jury.

"22. At no time, during the course of the trial, did Judge Boyer assist, volunteer to assist, or make any suggestions to or otherwise aid the un-

dersigned in the trial of this case." (R. 1138a-1139a).

So far as we can ascertain, petitioner's argument here assumes (1) Judge Boyer was prejudiced and (2) the jurors had read of the alleged commendation.

Petitioner states that Judge Boyer was well "respected throughout the county (R. 10a)." He assumes Boyer's prejudice and concludes that because he was respected, this prejudice *could* have affected the jury. But, this is a two-edged sword, the fact that he was respected to a great extent, rebuts the unsubstantiated charge of personal prejudice.

The petitioner asserts (Brief, pp. 67-68) that Judge Boyer acted as an "overseer" and that a two judge bench is without precedent. The only instance of Judge Boyer's participation in the trial is discussed in the certificate of Judge Keller, ante. Nevertheless, even if the case had been tried by both Judges Boyer and Keller on the bench, acting jointly, such could not have raised any issue of the lack of due process. There is no constitutional limitation upon the number of judges who may sit in the trial of a criminal case.

In Pennsylvania, despite the petitioner's bold assertion that a "two judge bench" is unprecedented, such procedure is not only common but required in the few remaining judicial districts wherein there are judges both learned in the law and associate or lay judges. *See Myer & Murray v. Commonwealth*, 79 Pa. 308. Also, "the president judge * * * must be present, with an associate to constitute a court of oyer and terminer and general jail delivery": *Lay Judges in Pennsylvania*, Vol. 25, Pennsylvania Bar Association

Quarterly, pp. 132-135. Thus, "The fact that two or more judges sit and cooperate in the trial, or that the judge who has been assigned to try the case invites another judge to sit with him is not in error": 23 C.J.S., Criminal Law, Section 972.

*In the court room as a spectator.* At this time, the judges of Bucks County did not wear robes even on the bench (R. 736a).

The District Court, after discussing his presence on the bench, found that on several occasions during the Darcy trial, Judge Boyer sat for brief intervals on a chair just inside the court room door from the judges' chambers—across the court room from the jury box—apparently listening to the proceedings (R. 1237a).

The opinion of the Court of Appeals states (R. 1250a):

> "* * * Certainly Judge Boyer was privileged to attend and observe proceedings of the court of which he was a judge. His presence in itself was not an impropriety. Even if the jurors identified him as an official who was hostile to the relator, we think it would be necessary to show that he had said or done something prejudicial to the defendant during his stay in the courtroom before the fact of his presence and manifest interest could raise a substantial due process question."

It is submitted that no denial of due process resulted from Judge Boyer's occasioned presence. It cannot be argued seriously that the judge's mere presence robbed the jury of its ability to determine petitioner's guilt or innocence on the evidence alone.

## D.

## *The Alleged Note Passing*

Petitioner contends that during the charge of the Trial Court Judge Boyer, while present in the courtroom but not on the bench, wrote and passed a note to the district attorney who thereafter, when afforded opportunity by the Trial Court, sought orally to clarify a portion of the Court's charge; thereby violating petitioner's constitutional rights to a fair and impartial trial.

The oral statement and colloquy by the district attorney and the Court in regard to the charge is set out in full in the record (R. 1149a). No contention has ever been made, either on direct appeal or in the present proceedings, that the statements then made by the district attorney and the Court's replies thereto in any way prejudiced petitioner's rights. Logically, therefore, even if a note had been written and passed by Judge Boyer to the district attorney, regardless of the contents thereof, the communication could not have prejudiced the rights of the petitioner.

Petitioner has never attempted to show by any evidence or inference the contents of the alleged note. There is no present contention that the contents thereof were ever directly communicated to either the Trial Judge or the jury. Even if all of petitioner's conflicting testimony be given the fullest credence in a light most favorable to him, petitioner's rights were not prejudiced. At the very most, the testimony would merely show that Judge Boyer's familiarity with the

facts (having presided at the trial of Zeitz and Foster) and the law of the case, and having heard Judge Keller charge the jury, attempted to have Judge Keller clarify for the jury a point of law. It is submitted, assuming Judge Boyer was present in the courtroom and heard the Trial Judge give incorrect or inaccurate instructions to the jury, that it would have been not only Judge Boyer's right but his obligation to call this matter to the attention of Judge Keller in order that the jury obtain proper instructions, whether the inaccurate instructions were favorable or unfavorable to petitioner's position. In view of the discussion that took place after a note was allegedly passed, it is clear that its contents could not have been of assistance to the district attorney in the prosecution of the case, but at most only of assistance to the Trial Court in giving accurate instructions to the jury. The instructions have been held by the Supreme Court of Pennsylvania to be accurate statements of the law (362 Pa. 259, 66 A. 2d 663).

Factually, however, petitioner has wholly failed to prove the allegations he now makes that Judge Boyer ever passed any note to the district attorney. The District Court concluded as follows:

> "* * * that Judge Boyer did not at any time during the Darcy trial assist, attempt to assist, make any suggestion or in any other manner aid the Commonwealth in the prosecution of the case against David Darcy; that Judge Boyer did not pass any note or message of any kind to the District Attorney in connection with the trial for

the use of the District Attorney or Judge Keller." (R. 1237a).

This finding of fact was accepted by the Court of Appeals (R. 1250a).

Petitioner sought to prove the alleged occurrence by the testimony of a brother and an aunt of petitioner, and also a personal friend of the aunt, all of whom claim to have seen the incident, although with considerable variance as to the details of the occurrence. Whether the note was passed became purely a question of fact and should not be disturbed by this Court.

In a habeas corpus proceeding, the judge is the trier of facts and he may reject any or all evidence. In 32 C.J.S., Evidence, Section 1038, it is said (pp. 1093-1096):

> "* * * A fact is not undisputed merely because one or more witnesses testify to it and no one denies it, since it is for the trial court to determine what credence it will give to witnesses. Further, evidence is not regarded as undisputed if it is at variance with the facts and circumstances in the case, or with reasonable inferences therefrom or from the evidence; and reasonable inferences from circumstances or physical facts may outweigh undisputed oral testimony. * * * it has even been declared a general rule that the trier of facts may disregard or discount uncontradicted evidence. The common view is that evidence not directly contradicted is not necessarily binding on the triers of fact, and may, in proper circumstances, be disbelieved and given no weight, in

whole or part, *especially where the witness is a party or otherwise interested, some authorities holding that, in determining the legal significance of evidence, the testimony of interested parties is not to be regarded as undisputed.*" (Emphasis supplied)

See also, *The Conqueror*, 166 U. S. 110, 131; *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401, 408.

It is apparent that the Trial Judge upon careful analysis of the testimony and observance of the witnesses on the stand did not believe their testimony. The Court of Appeals refused to disturb that finding of fact (R. 1250a). Further, the District Court found that Judge Boyer was not even in the court room during the charge to the court (R. 1237a).

There is a strong possibility that the testimony of these witnesses is of recent invention. Significantly, *neither member of the Darcy family, who testified about the alleged incident, brought it to the attention of trial defense counsel, Mr. Achey, nor appellate counsel, Mr. Thomas D. McBride, although they assert that the members of the family have been discussing it for six years* (R. Ford, 529a, Joseph Darcy, 555a-556a).

Joseph Darcy, who during the hearing in the District Court served a subpoena on one of the jurors (R. 852a), and who previously had been instrumental in securing the forbidden statements of jurors (See R. 848a), testified that during the charge he was seated in the third row behind the railing at the end of the

section toward the center aisle of the court room (R. 540a, 546a).[16] On Relator's Exhibit No. 119 this would be on the extreme right side of the picture (R. 1121a). He stated that the section was pretty crowded and *there were people in front of him* (R. 547a) *and he* was fifty feet away from Judge Boyer (R. 550a). However, his testimony is contradictory as to where Judge Boyer was supposed to have been seated. At one point, he said Judge Boyer was "*in area*" of seat marked "Judge Boyer" on Exhibit No. 135 (R. 1131a), but he doesn't know which chair (R. 543a). Generally, he first placed Judge Boyer in front of the rail (R. 546a) on a chair immediately against the railing (R. 554a). Later, he stated that Judge Boyer was seated three or four feet behind the District Attorney's table (R. 554a-555a), which table he had previously placed correctly in front of the jury (R. 547a). Conceding, arguendo, that he was mixed up and meant the table closest to him, the inherent improbability of his story is clear[17]. He stated that Judge Boyer wrote a note on the table three or four feet (R. 551a) in front of him (R. 544a), but that he did not get up from his chair (R. 551a). Next, "Q. How did he get over to the tables? A. He leaned forward. Q. Three or four feet?

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[16] In considering this phase of respondents' brief, we respectfully suggest that it will be helpful to make constant reference to the picture of the court room Relator's Exhibit No. 119 (R. 1121a) and the diagram of the court room, Relator's Exhibit No. 135 (R. 1131a).

[17] Commonwealth's witnesses testified to the effect that Relator's Exhibit No. 119 accurately depicts the location of the tables at the time of the Darcy trial (R. 651a). Relator's witness, Gordon, likewise so testified, except perhaps the table shown would be back further—*toward the bench* (R. 630a).

A. Yes." (R. 551a). It is submitted that the table was further away than three or four feet (Rel. Exhibit No. 119, and R. 876a), but, in any case, it would be practically impossible to have written anything on that table in the manner described by this witness. He further testified that after writing the note, Judge Boyer *did not* hold it up, but "just passed" it to District Attorney Beister, who was seated aside of Judge Boyer (R. 553a) throughout the charge (R. 548a). Then Beister allegedly got up and went across to the center of the court room and waited to be recognized by the court (R. 544a).

Neither this witness, nor the witnesses, Ford and Gordon, who testified about this alleged incident, stated that the note was passed by Beister to Judge Keller.

Gordon and Ford were allegedly seated aside of each other at this time in the second row where the letter "G" is marked on Relator's Exhibit No. 135 (R. 485a, 486a, 613a, 617a). Contrary to Joseph Darey's testimony, Ford stated that Judge Boyer was seated on the end seat marked with his name on Relator's Exhibit No. 135 (Cf., Rel. Ex. 119, R. 483a). Gordon couldn't say which chair he occupied (R. 613a). Although seated behind Ford on an angle with Judge Boyer, Joseph Darey does not recall seeing Ford (R. 564a).

Oddly enough, both of these witnesses were approximately ten feet (R. 514a, 631a) closer to Judge Boyer than Joseph Darey, but both testified they did *not* see Judge Boyer write the note (R. 522a-523a, 631a) notwithstanding the fact that Gordon stated she *was*

*watching Judge Boyer at the time* (R. 615a, 631a). Gordon said Judge Boyer "raised" his arm to pass the note (R. 615a); Joseph Darey said the note was not held up, but "just passed" (R. 553a). Gordon said there was nothing between Judge Boyer and the jury at this time (R. 615a-616a); Ford testified there were four or five people at the Commonwealth's table (R. 519a-520a) at the time and Joseph saw three or four at the table nearest to Judge Boyer (R. 548a).

Ford stated that Beister "jumped up[18] and stood at the bar in front of Judge Keller for five or ten minutes, waiting for recognition. During this interval Judge Keller continued to charge the jury and then Beister spoke. A reading in the District Court of this portion of the charge took forty-eight seconds (R. 524a-525a).

Darey's counsel admitted the interest of the witness, Ford (R. 476a-477a) and Gordon was a close friend of Ford (R. 619a). Petitioner's own evidence as to the alleged incident is highly contradictory. It is exaggerated and could well be the product of rehearsal by the witnesses themselves (See R. 501a, Cf., R. 509a).

Although the burden of proof to establish the fact was upon the petitioner, nevertheless the Commonwealth produced direct testimony that no such note was even passed. Significantly, Judge Boyer died before the present proceedings were instituted.

Edward G. Beister, the District Attorney who tried the case, and who is now Judge of the Courts of Bucks

[18] The District Court had ample opportunity to observe the demeanor of Judge Beister.

County, Pennsylvania (R. 870a), testified that his "best recollection" was that "at no time during the course of the trial did Judge Boyer assist, attempt to assist, make suggestions to or otherwise aid the Commonwealth in the trial of the case nor pass any messages to [the District Attorney] in connection with the trial of the case for the use of [the District Attorney]" (R. 911a-912a). This testimony was brought out upon cross examination and is positive testimony. In addition, Judge Keller, the Trial Judge, produced evidence by way of certificate (Respondent's Exhibit No. 5, R. 1113a et seq.), that:

> "22. At *no other* time, during the course of the trial, did Judge Boyer assist, volunteer to assist, or make any suggestions to or otherwise aid the [Trial Judge] in the trial of this case." (R. 1139a) (Emphasis supplied)

The "other time" reference is to a ruling on evidence made during the course of the trial and is in no way related to the alleged note passing incident. In addition, tipstaves and other court officials and persons present in the courtroom during the trial were called by the Commonwealth. Clarence Dannehower, one of the tipstaves, who was present throughout the trial and seated on an elevated chair behind and above the jurors and having a clear view of the court room (R. 649a-650a) testified that he saw no note passed (R. 650a), and that his duty was to observe for any unusual incidents (R. 661a). Other tipstaves testified that they saw no note passed.

In addition to the correct finding of fact by the District Court that no note was ever passed, there is ab-

solutely no evidence that any of the jurors observed the incident. Petitioner contends that the jurors must have seen the incident simply because it is alleged to have occurred in the courtroom. This inference, completely unwarranted by any evidence, is further stretched to the limit of imagination by contending that the jury, having observed the alleged incident, must have thereby unfairly prejudiced themselves against the petitioner.

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## *E.*

### *The Sentencing of White on June 12*

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The petition alleges that Judge Boyer made a statement in the sentencing of one, White, during the trial of Darcy and that such statement "would be definitely reflected in the jury box and would be prejudicial to their relations in having a fair and impartial trial" (R. 9a-10a).

Since the evidence completely refutes such an allegation in that the Darcy jurors did not have any knowledge of it [19], he (petitioner) now shifts his position and states that it is evidence of Judge Boyer's personal feeling and indignation against Darcy and his compañions. There is no shred of evidence to sustain a contention that Judge Boyer was prejudiced against

[19] Since they were segregated they did not read it. See page 20, ante. The petitioner's own witness, Trauch, who wrote the article, testified that the statement could not be heard by the Darcy jury since they were downstairs in the court room where Darcy's case was going on (R. 248a).

the petitioner. The newspaper reports aside from being purely hearsay, completely fail to show any prejudice by Judge Boyer against petitioner. The trial of the Foster-Zeitz case by Judge Boyer has long been affirmed. Petitioner further contends that the jury must have known of Judge Boyer's "prejudice" against David Darcy. Again there is absolutely no evidence that the jury in any way knew or were concerned with the personal feelings of Judge Boyer, whatever they may have been. Petitioner finally contends that because the jurors knew of Judge Boyer's supposed prejudice against petitioner that they, as individual jurors, were thereby swayed to render the death penalty. There is absolutely no evidence to indicate in any way that the jury was influenced by Judge Boyer's presence in the courtroom. There is absolutely nothing in the record to show that Judge Boyer did anything improper to prejudice the petitioner in the trial of this case. It is submitted that his actions throughout the trial of the case were perfectly proper and could not by any stretch of the imagination have influenced the jury in any way in reaching its verdict.

## 7.

## CONCLUSION

In *Rosenberg v. United States*, 346 U. S. 273, Mr. Justice Clark said, at p. 296: "Our liberty is maintained only so long as justice is secure. To permit our judicial processes to be used to obstruct justice destroys our freedom. Over *two* years ago [the defendants] were found guilty by a jury. Unlike other litigants they have had the attention of this Court *seven* times; each time their pleas have been denied. Though the penalty is great and our responsibility heavy, our duty is clear". In the instant case, petitioner was found guilty over *seven* years ago by a jury. He has had the attention of this Court *five* times. The record reveals that he has failed to prove any facts from which it can be concluded that he was denied due process of law. "Indignation, because of the cruelty of the deed, there doubtless was; it would be strange if such were not the case in a law abiding community; but there is nothing which convinces us of the existence of such passion or prejudice as would prevent the twelve 'sober, intelligent and judicious' jurors who were sworn to try the issue from rendering a true verdict on the evidence", *Commonwealth v. Buccieri*, 153 Pa. 535, 546, 26 Atl. 228.

The penalty fixed for the petitioner was caused by the facts of the crime as produced in evidence. As in *Stein v. New York*, 346 U. S. 156 at 197: "The peti-

tioners have had fair trial and fair review. The people of the State are also entitled to due process of law".

Wherefore, it is respectfully submitted that the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,
DONALD W. VANARTSDALEN,
*District Attorney,*
Doylestown, Pa.
FRANK P. LAWLEY, JR.,
*Deputy Attorney General.*
HERBERT B. COHEN,
*Attorney General,*
Attorneys for Respondents.

State Capitol,
Harrisburg, Pa.
March 16, 1956.